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SIPDIS
SENSITIVE

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TAGS: EINV ECON BR
SUBJECT: Brazil: Investment Agreement Discussion on EPD Margins

SENSITIVE BUT UNCLASSIFIED

¶1. (SBU) Summary: DOS and USTR representatives met with Brazilian Ministry of External Relations officials Carlos Marcio Cozendey, Minister, Director of the Economic Development Department and Marcello Salum, Gabinete to the Under-Secretary for Economic and Technology Affairs, on October 29, in advance of the Economic Partnership Dialogues (EPD) on the 30, to continue investment-agreement-related discussions. Cozendey acknowledged that Brazil is still not ready to begin negotiating a Bilateral Investment Treaty (BIT), but does see internal Brazilian movement in this direction. Cozendey proposed a detailed agenda for the next round of investment discussions, including CFIUS and indirect expropriation. End summary.

¶2. (SBU) Cozendey stated that BITs suffered from a negative perception, explaining that many politicians felt Brazilian investors would be discriminated against in terms of dispute resolution, based on the Brazilian investors only having local remedies available in Brazil whereas foreign investors would also have international arbitration available. He also reiterated some of the same GOB concerns expressed at the investments talks on the margins of the last EPD, including provisions relating to investor-state arbitration, indirect expropriation, coverage, and transfers. Cozendey contrasted a more stable Brazilian business environment today with that of the early 90's in arguing for a smaller BIT role in Brazil.

¶3. (SBU) Despite a perceived lack of political interest in moving forward with BIT negotiations, Cozendey conceded that recent direct expropriations of Brazilian investments in Bolivia and Ecuador prompted increase attention on FDI protection mechanisms on the part of the Brazilian business community. However, Cozendey noted that this concern is primarily born from Brazilian investment domiciled in less stable markets, adding that the private business community is still not pressing for legislative changes.

¶4. (SBU) Cozendey described key principles in Brazil's new investment agreement model while acknowledging that they were not as extensive as the USG BIT requirements. Cozendey explained that the new GOB approach did not include provisions for mandatory investor-State arbitration, nor protections against "indirect" expropriation in which government actions destroy the value of an investment. Instead, Cozendey clarified that it provided protection only with respect to direct expropriation in which a government takes property's legal title. Cozendey added that the new GOB approach limits the scope of investments covered by the agreement to direct but not portfolio investments and that the model includes significant cross-references to national legislation, rather than a reliance on international standards. Cozendey stressed that this new approach was intended to address concerns in Brazil's Congress that led to the GOB's failure to win ratification approval for the BITs negotiated in the 1990s.

¶5. (SBU) GOB suggested continuing to hold periodic investment policy discussions on the margins of the bi-annual EPD. Cozendey expressed interest in CFIUS reform and suggested an earlier meeting should more details become available on proposed regulations implementing the Foreign Investment and National Security Act of 2007 (FINSA). Cozendey suggested a more expansive agenda for the next meeting to

included discussions on indirect expropriation and related cases handled under NAFTA, and a further update on CFIUS; he expects to bring Finance Ministry officials to the next meeting. Salum added that he would like to discuss and examine dispute resolution cases involving FDI in public utilities and parastatal companies at the next meeting.

¶6. (SBU) Comment: Although no breakthrough was achieved during the meeting, there were definite signs that the GOB is interested in continuing an investment dialogue, especially in light of increased Brazilian investment abroad. End Comment